United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2264

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- DENNIS DRUMMOND, Appellant.	Docket No. 74-2264

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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QUESTIONS PRESENTED

1. Whether the delay of one year in re-trying appellant violates the Plan for Prompt Disposition of Criminal Cases and whether reversal of the conviction and dismissal of the indictment are required.

2. Whether appellant's constitutional right to a speedy and fair trial was denied.

3. Whether it was error to admit any evidence concerning the February 3, 1972, transaction, and whether the admission of this evidence was so prejudicial as to require reversal.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Thomas C. Platt) rendered September 20, 1974, convicting appellant of conspiracy to distribute heroin and sentencing him to five years in prison and a five-year term of special parole.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Prior Proceedings

Appellant was indicted on June 1, 1972, for conspiracy to possess and distribute 125 grams of heroin, and possessing a narcotic drug without a prescription.*

Appellant's first trial commenced before Chief Judge Jacob Mishler on October 3, 1972, and concluded on October 6, 1972, with a declaration of mistrial because the jurors were unable to reach a verdict. The second trial, also before Chief Judge

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*The indictment is "P" to appellant's separate appendix. In this proceeding appellant was tried only for conspiracy to distribute.

Mishler, commenced on October 18, 1972, and concluded on November 2, 1972, when the jury rendered its verdict finding appellant guilty of the conspiracy. On December 17, 1972, he was sentenced to a term of five years' imprisonment and to a special parole term of five years.*

On July 5, 1973, this Court (The Honorable Henry J. Friendly, The Honorable Paul R. Hayes, The Honorable William J. Jameson) reversed the judgment because of prosecutorial misconduct. A new trial was ordered.

The mandate of this Court was mailed to the office of the Clerk of the District Court on September 14, 1973, twenty-nine days late (see Rule 41, Fed.R.App.Proc.). The Clerk's Office of the United States District Court for the Eastern District of New York received the mandate on September 19, 1973. In accordance with procedures of the District Court clerk's office, a different judge -- Judge Travia -- was randomly selected to hear the proceedings on remand, and he was sent a copy of the District Court docket sheet (Record on Appeal, Document #5).

No further steps were taken in this matter until April 12, 1974, when the case appeared on the District Court calendar and was adjourned to May 3, 1974.

On that day a motion which had been filed on April 16, 1974, by defense counsel, was returnable requesting dismissal of the indictment for failure to commence the retrial in this

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*See Docket Sheet, which is "A" to appellant's separate appendix.

case within the time period required by Rule 6 of the Prompt Disposition Rules (Record on Appeal, Document #2).

In its affidavit in opposition, the Government argued that the delay in trial of the case was for good cause: the actual engagement of Judge Travia in another proceeding involving a protracted trial. That proceeding, United States v. Bernstein et al., 72 Cr. 587, began on May 26, 1972, some four months prior to the assignment of this case to Judge Travia. Extensive pretrial proceedings and hearings took place from July 21, 1972, until October 15, 1973. The trial began on October 15, 1973, and continued through July 5, 1974.

As a result of the proceedings in United States v. Bernstein et al., other cases before Judge Travia were transferred from him to other judges during the period between mid-September 1973 and April 1974.*

At oral argument on the motion to dismiss the indictment, held on May 3, 1974, defense counsel stated that prior to April 12, 1974, the case had not been placed on the court calendar, by either the Court or the prosecutor's office.

The prosecutor's office took the position that putting the case on the calendar was solely within the responsibility of the Court, and that the United States Attorney's office had no

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*These included two Legal Aid Society cases, United States v. Cowley, 73 Cr. 653, and United States v. Galindo-Valdez, 73 Cr. 953. Cowley was transferred to Judge Weinstein on March 7, 1974, and Galindo-Valdez was transferred first to Judge Weinstein on January 21, 1974, and then to Judge Mishler on February 19, 1975.

duty to place the case on the calendar or, in this instance, to file a notice of readiness.

Judge Travia denied the motion to dismiss, saying he would "welcome the scrutiny of the Court of Appeals." He then signed an order transferring the case to newly-appointed, but unsworn, District Judge Thomas C. Platt.*

On June 10, 1974, the motion to dismiss was renewed before Judge Platt. It was argued that appellant's constitutional right to a speedy and fair trial, as well as his rights under District Court's Prompt Disposition Rules were violated. Counsel argued that the Rules of the Eastern District require that the Assistant United States Attorney place a case on the calen-

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*After denial of the motion, appellant sought a writ of mandamus in this Court to dismiss the proceedings (Doc.No. 74-1666). The papers before this court included an affidavit by counsel for appellant which stated:

"1. In those cases in which the Court of Appeals reverses a judgment and remands the proceeding for a new trial, the case is handled by a judge other than the judge who conducted the original district court proceedings. The selection of a judge is made at random by drawing a card from the wheel. The newly-assigned judge is then sent a copy of the docket sheet of the case.

"2. The clerk's office takes no further steps on the matter until the case is restored to the judge's calendar by the United States Attorney's office.

"3. In the event a district judge is unable to try a case, he advises the Chief Judge, who then seeks to transfer the matter to another member of the Bench."

This affidavit was uncontradicted.

This Court, after response by the Government and oral argument, denied the writ without prejudice to raise the issue on appeal.

dar and that the district judge assigned to a case notify the Chief Judge of the difficulty of trying the case to obtain a transfer of the case to another judge (Record on Appeal, Document #5).

Counsel also made clear that, despite efforts of a Legal Aid Society investigator and appellant,* three defense witnesses who had testified at the two prior trials could not be located.

Oral argument was heard on June 21, 1974. At that time, counsel advised the Court that all the defense witnesses were missing. The Judge told defense counsel that if she wanted the testimony she could read the minutes of the prior proceeding to the jurors. He told counsel that the loss of witnesses was neither the court's nor the prosecutor's fault (Minutes of June 21, 1974, at 4-7).

Counsel objected to the trial's taking place, and, without alternative, agreed to review the prior transcripts for the purpose of selecting the testimony to be read to the jury (Minutes of June 24, 1974, at 7).

On July 11, 1974, the motion was renewed again as violative of both the Prompt Disposition Rules and the Constitution. The prosecutor replied that his office was in no way responsible for the delay, and that the office had, albeit unsuccessfully, also tried to find a key defense witness (Minutes of July 11, 1974, at 6).

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*See affidavits of appellant and John Keeney (Record on Appeal, Document #5).

Judge Platt agreed that the reason for the delay was Judge Travia's involvement in a nine-month trial. The delay of the trial in this case before Judge Platt was due to the need first to try several cases where defendants were in custody.

The Judge denied the motion to dismiss because there was no prosecutorial delay.

At this proceeding, just prior to the commencement of the trial, defense counsel objected to the introduction into evidence of any testimony concerning an undercover sale of heroin on February 3, 1972, a week prior to the sale charged in the indictment, and to the admission into evidence of the drugs sold on that date (Minutes of June 11, 1974, at 12-13). The Government argued that the transaction showed motive and intent, to which defense counsel argued there was no evidence to show that appellant had been involved in the February 3, 1972, transaction. The Judge denied the motion with permission to renew.

The Trial

A. The Government's Case

Pursuant to arrangements made with Walter Days, on February 3, 1972, undercover narcotics agent Bernhardt met with Donald Days at a lower level living room at 210 Cornelia Street*

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*The building was three stories with an entrance upstairs and one downstairs. There were two apartments in the building.

(33*) to purchase one-eighth kilogram of heroin (34). Donald Days counted the money displayed by Agent Bernhardt, but returned it to him. Days then left the room.

Days returned to the room carrying a grey metal box. He explained that his procedure was to use the money already in the box to purchase the drugs from his seller, and would have Agent Bernhardt pay him later (34). He explained that they would have to wait for the drugs. This was the procedure followed (52).

While they were in the living room, the doorbell rang. Donald Days went upstairs and returned with a small scale and a plastic bag containing white powder (35). Donald weighed the package and gave it to Bernhardt. Bernhardt then gave Days the money (35), and left through the lower level entrance (39).

The contents of the package was 16.33% pure heroin (40). The package and the scale were introduced into evidence (38, 39-44, 171). Defense counsel argued that neither should be admitted since they had no connection with her client (45-46).

Two surveillance agents, Jones and Miller, testified that on February 3, 1973, they saw an unidentified man leave the building at 210 Cornelia Street and enter a brown Toronado (152; 167-168).

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*Numerals in parentheses refer to pages of the transcript of the trial.

B. Objection and Charge

At this point in the trial, pursuant to an earlier request by defense counsel (22-26*), the Judge instructed the jurors that they could not consider the February 3, 1972, transaction against appellant unless they found that appellant was a member of the conspiracy at that time (36). The same limiting instruction was given with respect to the jury's consideration of the scale used on February 3, 1972 (45).

C. The Government's Case Resumed

On February 9, 1972, Agent Bernhardt made arrangements with Donald Days for a purchase of drugs the next day (41).

On February 10, Bernhardt entered the house through the upstairs entrance and proceeded downstairs to the living room (41). He discussed the delivery with Days. Appellant was present at that time (42). Days got the box containing the money, gave some of it to appellant, and told appellant to get the "stuff" (43).

Appellant then left the house. Agent Bernhardt left the building to report to the surveillance agents that the transaction would take longer than expected (46). While outside, he saw appellant drive by in a 1968 or 1969 Oldsmobile Torc-

*Defense counsel first tried to keep the evidence of the February 3, 1972, transaction out altogether. Having been unsuccessful at that level, she sought a limiting instruction (24).

nado (46-47), and radioed to his fellow agents to arrest appellant before he returned to the house (47). Bernhardt then returned to the apartment (65).

Counsel then sought to have Bernhardt's testimony about the events of February 3, 1972, stricken, on the ground that the Government had not proved that appellant had any connection with those events (72). Decision was reserved (72).

Jones and Miller, the surveillance agents, saw appellant, whom they had never seen before, leave the building and enter a 1968 or 1969 brown Oldsmobile Toronado (153-155; 169). While out, appellant was seen to enter another building, but the agents did not know where it was.

Agent McDonald testified that he arrested appellant while he was driving a brown Toronado (74) on February 10, 1972, and found in appellant's possession $3,750 (81). Of this, $2,920 consisted of bills with serial numbers which had been recorded on February 2, 1972, and given to Agent Bernhardt to use in the February 3, 1972, transaction* (82). No drugs were found (108).**

At the conclusion of the evidence, defense counsel sought to have all of Bernhardt's testimony relating to February 3, 1972, stricken, on the ground that the Government had not proved that appellant was involved in that transaction (207). The motion was denied on the ground that the money and the car were sufficient to tie appellant to the February 3, 1972, transaction (210).

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*A list of the serial numbers of the bills was introduced into evidence (173).

**A small amount of heroin and cocaine was found, but it was assumed by both defense and prosecution that these were not the drugs intended for distribution.

D. The Defense Case

Appellant's wife testified that on the morning of February 9-February 10, 1972, appellant returned home with money he had won in a dice game (217-218). Appellant slept for a time, and then she and appellant, with their child, went to visit the Dayses to see if they would join the Drummonds for dinner* (212). They arrived upstairs. Appellant put the child down in a bed in Mrs. Days' bedroom and left while Mrs. Days and Mrs. Drummond were watching television (212). Later the police broke in (214) and brought two men upstairs (216).

Appellant testified to the same circumstances, adding several material facts. He said that a friend named James Clark was at the dice game and had testified at the two prior trials that appellant had won a large sum at the dice game. However, appellant testified, that despite efforts to find Mr. Clark he could not be located to testify at the present trial (276).

Appellant also testified that the brown Toronado belonged to his brother** and that he borrowed the car to drive to the Days apartment (279).

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*The testimony that appellant arrived at the Days house with a woman and child was confirmed by the surveillance agents.

**Appellant explained that his old car was used by his brother David as a trade-in for the Toronado (280) and that the car was purshased by and registered to David (281; 319).

Appellant also added that after arriving at the Days apartment he was let out by Mrs. Days. However, Mrs. Days was another witness he could not locate to testify at this trial (290). Appellant testified that after leaving the Days house he went to a Mrs. Gardner's house to tell her niece he would see her later. Mrs. Gardner was another unavailable witness.

Defense counsel requested that the Judge instruct the jury that the absence of the witnesses whose prior testimony would be read should not be treated as a reflection of their credibility (336). The Judge agreed only to state that the defense had made efforts to locate the witnesses and could not do so, and that in lieu of their presence, testimony at a prior trial would be read (336). Counsel also requested dismissal of the indictment due to the delay and the denial of a fair trial (339). The motion was denied (340), and the charge as earlier articulated by the Judge was given:

> ... [I]t is my recollection that the defendant testified he made an effort to locate certain witnesses who testified in previous hearings for him and was unable to do so for this trial and so he is going to be permitted to read or the court stenographer will read in his behalf the testimony given in the fall of 1972 by these three witnesses.
>
> The credibility of the witnesses based on the direct and cross-examination which you will hear will be up to you, but of course the witnesses are not here and you will have to take the next best, which is their prior testimony under o th and you will listen to both the direct and the cross-examination and make up your own minds as to the credibility. That is a question for you.
>
> (341).

The testimony of Mrs. Days, Mrs. Gardner, and Mr. Clark was then read to the jury. Mr. Clark's testimony was that appellant had won more than $2,500 in the dice game (365-367).

In rebuttal, the Government called Don Silver, who testified that the brown Toronado was originally to be sold to appellant with his 1969 Charger as a trade-in, but that the bill of sale was changed to have David Drummond's name on the original bill (395-399).

Counsel again sought to have the testimony relating to February 3, 1972, stricken. The motion was denied (408).

In his charge to the jury, Judge Platt instructed:

> Now you will recall at the outset of the trial I gave you the so-called limiting instructions which pertained to the events that took place on February 3rd as distinguished from February 10th. I am going to give you this specific instruction with respect to those events now:
>
> The fact that the accused may have committed an offense at some time is not any evidence or proof whatever that, at a later time, the accused committed the offense charged in the indictment, even though both offenses are of a like nature. Evidence as to an alleged earlier offense of a like nature may not therefore, be considered by the jury, in determining whether the accused did the act charged in the indictment. Nor may such evidence be considered for any other purpose whatever, unless the jury first find that other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the act charged in the indictment.
>
> If the jury should find beyond a reasonable doubt from the other evidence in the case that the accused did the act charged in the indictment, then the jury may consider evidence as to an alleged earlier offense of a like nature, in determining the state of mind or intent with

> which the accused did the act in the indictment. And where all the elements of an alleged earlier offense of a like nature are established by evidence which is clear and conclusive, the jury may, but is not obliged to, draw the inference and find that in doing the act charged in the indictment, the accused acted wilfully and with specific intent, and not because of mistake or accident or other innocent reason.
>
> (467-468).

During deliberations, the jury requested re-reading of Bernhardt's testimony relating to the February 3, 1972, transaction, of Mrs. Day's testimony, and of the testimony of Agents Jones and McDonald relating to their observations on February 10, 1972 (496).

At the conclusion of their deliberations, the jurors found appellant guilty.

ARGUMENT

Point I

THE DELAY OF ONE YEAR IN RE-TRYING APPELLANT VIOLATES THE PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES AND REVERSAL OF THE CONVICTION AND DISMISSAL OF THE INDICTMENT ARE REQUIRED.

Rule 6 for the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases* requires that in a case in which a new trial has been ordered by an appellate court, such trial

> ... shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause.

In this case, the judgment of this Court reversing the judgment of conviction after the prior trial was rendered on July 5, 1973. The new trial did not begin until July 11, 1974, more than one year later. The long, inexcusable delay in beginning appellant's re-trial requires reversal of the judgment and remand with a direction to dismiss the indictment.

A. The Length of the Delay

The time period allowed by Rule 6 of the Plan is not longer than ninety days after the finality of an order directing a new trial. The date on which the judgment of this Court was en-

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*Hereinafter referred to as "the Plan."

tered* is the date on which the ninety days began to run, for that order was one which adjudicated the rights of the parties. Dept. of Banking v. Pink, 317 U.S. 263, 266 (1942); Forman v. United States, 361 U.S. 416, 426 (1960). The finality of the judgment of the Court of Appeals reversing the conviction could have been suspended by a motion for re-hearing made within fourteen days of the judgment (see Rule 10, Fed.R.App.Proc.), but no such motion was made. See United States v. Healy, 376 U.S. 75 (1964); Stern and Gressman, SUPREME COURT PRACTICE, §6.2 at 245-246 (4th ed. 1967); 6a Moore, FEDERAL PRACTICE, §59.05(2) at 59.233-324 (2d ed. 1974); 7 Moore, FEDERAL PRACTICE, §79.02 at 79.51-55 (2d ed. 1974).

Even if the order is not final until issuance of the mandate, the mandatory langauge of Rule 41(a) of the Federal Rules of Appellant Procedure required issuance of the mandate on July 26, 1973, with the trial to have begun no later than October 27, 1973.**

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*Rule 36, Fed.R.App.Proc., requires a notation on the docket sheet of a judgment as entry unless a final settlement is ordered by the court. According to the advisor's note, this delay was advisable under the principle of finality if the precise terms of the judgment were not settled. Thus, the finality principle is incorporated in Rule 36.

**In fact, in this case the mandate did not issue until September 14, 1973. Whatever the reason for the delay in the ministerial function of stapling the opinion to the judgment and mailing it to the district court clerk's office, in violation of the mandatory language of the Rule, the delay cannot inure to the detriment of appellant's rights. United States v. Furey, 500 F.2d 338 (2d Cir. 1974). Even on this time schedule, however, the trial should have begun by December 18, 1973.

B. No Good Cause for Delay

Rule 6 permits an extension of the ninety-day period for good cause. Here, there was no good cause for the delay or any part of it.

A review of the record in this case indicates that the only excuse proffered for the one-year delay in trying this case was Judge Travia's involvement with an extraordinarily complex case, United States v. Bernstein et al., 72 Cr. 587.

However, when Judge Travia was randomly assigned (see Rules 2(a), 2(a)(3), 2(b) of the Rules of the Eastern District) to this case for the new trial and was sent the docket sheet, he was already actively engaged in the pre-trial proceedings in United States v. Bernstein, supra (see District Court docket sheet, E.D.N.Y. 72 Cr. 587). He was aware of the long and imminent trial, and it was not only foreseeable, but a certainty, that Judge Travia could not try this case within ninety days.

Despite these circumstances, and although Rule 6(c)(4) of the Eastern District Rules required that this case be given a preference for trial, and Rule 6 of the Plan required re-trial within ninety days, Judge Travia did nothing to ameliorate the problem.

The Plan makes clear that the judge has responsibility for "setting and calling cases for trial" and for scheduling "criminal trials at such time as may be necessary to assure prompt disposition of criminal cases" (Rule 9(a)). The Eastern District Rules enable a district judge to meet that responsibility by

reassignment of the case. Thus, the Eastern District rule requiring random selection of judges (Eastern District Rule 2), even in those cases remanded for re-trial (Eastern District Rule 2(a)(3)), also include provision for reassignment of cases by the Chief Judge of the District "in the interest of justice and the efficient performance of the business of the court" (Eastern District Rule 4) when necessitated by death, retirement, resignation, or incapacity of any judge, by the appointment of a new judge or by "any other circumstances."

No steps were taken by Judge Travia to transfer the case to another judge so that the trial could take place. This occurred despite the transfer of other cases from Judge Travia during the relevant period.

The availability of a procedure for reassignment to try cases within the time period precludes the argument that general court congestion or Judge Travia's own trial schedule is what delayed this trial. Indeed, the Eastern District procedure is an effort to comply with the principle that the Government has the responsibility for affording a prompt trial.

C. Dismissal Is Required

In the proceedings below, the prosecutor claimed that because he had no part in the delay and that the responsibility for the trial of the case rested solely with the court, the Rules did not require dismissal.

The Government asserts it was at all times ready for trial and that, therefore, dismissal is improper. However, this argument fails to deal with the language of Rule 6 and the intent of the Rules. Rule 6 speaks mandatorily, and not permissibly, requiring that the trial commence not later than ninety days after the finality of the order granting a retrial. It is obvious that since there is no reference to government readiness, as there is in Rule 4, the rulemakers assumed the Government's readiness since a trial had already taken place. Thus, the thrust of the Rule is that the trial shall take place, not merely that the Government be ready.

Further, to permit the trial to commence runs counter not only to the express language of Rule 6 of the Plan, but to the purpose and scheme of the Plan, which is oriented to keeping cases from becoming delinquent. Rule 2(a) of the Plan requires that the United States Attorney report delinquent cases to the Chief Judge of the District Court.* Moreover, Rule 7 of the

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*Thus, the United States Attorney is assigned a role under the Rules beyond that of being ready for trial, for he must report delinquent cases to the Chief Judge. The procedures of the Eastern District requiring the prosecutor's office to calendar a case are also part of the Assistant's role in keeping the dockets current. Further, while Rule 2(b) of the Plan

Plan requires a pre-trial conference for the scheduling of a trial date.* Indeed, the recognition of the importance to immediate re-trial appears in the Eastern District Rules requiring a preference for re-trials on remand.

Rule 6 is clear that the re-trial cannot be held after the ninety-day period unless the time is extended for good cause. If, as here, there is no good cause shown, no trial can take place.

Moreover, the omission from Rule 6 of a dismissal provision is irrelevant to the prohibition of commencing the trial or continuing the prosecution. To accept the argument that this Court can provide no ultimate disposition for this case will have the absurd effect of causing the criminal charges which cannot be tried to remain open against appellant. Dismissal is the vehicle, inherent in the powers of the court for disposing of this case so that it does not remain a means of oppression. Jackson v. Indiana, 406 U.S. 715, 740 (1972); Strunk v. United States, supra; semble United States v. Marion, 404 U.S. 307 (1972); Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965).

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requires a six-month review of cases which are pending beyond beyond the time periods included in Rule 3 and 4, the Rule obviously permits review in a shorter period of cases delinquent under Rule 6.

*Rule 7 of the Plan makes the discretionary pre-trial conference of Rule 17.1 of the Federal Rules of Criminal Procedure mandatory.

Point II

APPELLANT'S CONSTITUTIONAL RIGHT TO A SPEEDY AND FAIR TRIAL WAS DENIED.

Appellant argued that his constitutional right to a speedy and fair trial, as well as his rights under the Plan, were violated.

Since the delay was more than nine months (Strunk v. United States, supra), inquiry into the other three factors is necessary. Barker v. Wingo, supra, 407 U.S. at 530.

The reason for the delay, as shown in Point I, was the failure of the judge randomly assigned to the case to seek its reassignment until long after the time period had elapsed. The transfer of other cases to other judes shows that court congestion was not the cause of this delay and cannot excuse the failure to have this case tried.

The prejudice to appellant is unequivocal: three defense witnesses could not be located. These witnesses provided support for the defense that appellant had won the money found in his possession at his arrest at an all night dice game and that although he was at the Days house on February 10, 1972, he had nothing to do with a drug transaction.

In order to present this testimony, defense counsel was compelled to rely on a reading of the transcript of the testimony given at the prior trials. This procedure obviously denied appellant the opportunity to have the jury see his witnesses and evaluate their credibility by observing demeanor, behavior,

and appearance. United States ex rel. Graham v. Mancusi, 457 F.2d 463, 469 (2d Cir. 1972); Payne v. Wingo, 442 F.2d 1192, 1193 (6th Cir. 1971); Dyer v. MacDougall, 201 F.2d 265, 268-269 (2d Cir. 1952); People v. Becker, 215 N.Y. 126, 159 (1915).

The Judge refused to ameliorate the impact of the absence of the witnesses and declined to tell the jurors, as requested by counsel, that the absence of the witnesses should not affect their credibility. Instead, he told the jurors that the defense could not locate the witnesses and that evaluation of the credibility of the testimony they heard read was up to them, but that the witnesses were not present.

The importance to the jurors of the evidence from the absent witnesses is clear because it was part of the testimony which they requested to have re-read during their deliberations. Further, the first trial ended in a hung jury, conceivably because of these defense witnesses.

Although counsel made no request for a trial, under these circumstances this should not be a fatal omission. Barker v. Wingo, supra, 407 U.S. at 533; Moore v. Arizona, 414 U.S. 25 (1973). The District Court was functioning under a mandatory rule requiring a trial within ninety days. Rule 6 of the Plan prohibits trial after ninety days, and after the expiration of that period, counsel justifiably need not have sought a trial, but relied on a demand for dismissal of the indictment.

Point III

IT WAS ERROR TO ADMIT ANY EVIDENCE CONCERNING THE FEBRUARY 3, 1972, TRANSACTION; THE ADMISSION OF THIS EVIDENCE WAS SO PREJUDICIAL AS TO REQUIRE REVERSAL.

Throughout the proceedings defense counsel made unequivocally clear that she objected to the admission of any testimony or evidence which related to the sale of narcotics on February 3, 1972. Counsel's position was that the Government failed to prove any connection between appellant and that transaction.

It will be recalled that there was no testimony that appellant was seen at, in, or near 210 Cornelia Street on February 3, 1972. The Judge ruled, however, that the Government showed appellant's connection to the February 3, 1972, transaction by two pieces of evidence: the presence on that date of the brown Toronado in front of 210 Cornelia Street, and the finding in appellant's possession on February 10, 1972, of currency used on February 3, 1972.*

The Judge's determination is wrong and is unsupported in the record. The presence in appellant's possession of the money used in the transaction which occurred on February 3, 1972, does not support an inference of appellant's involvement in that day's

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*The Judge must have concluded that the connection was made as a matter of law, because he instructed the jurors that they might use the evidence of the February 3, 1972, transaction as proof of appellant's knowledge that the February 10, 1972, transaction, involved heroin.

transaction under either the Government's or the defense case at law. The defense showed that appellant won the money at a dice game on February 9, 1972. The testimony of government witness Bernhardt was that appellant received the money from Days on February 10 as part of the February 10 transaction. According to Bernhardt, Donald Days's method of operation was to look at the money a purchaser intended to use to buy drugs. However, money which Days already had and which was kept in a metal box was actually used to pay his supplier for drugs to be used in the transaction. After Days purchased the drugs form his supplier and paid for them with money already in Day's possession, he sold the drugs to his purchaser. The money he received in the sale would then be put in the metal box. Bernhardt testified that on February 10, 1972, Days gave appellant some money from the box and told him to pick up the "stuff." Thus, according to the Government's own evidence, this was the money appellant received as Days's aide on February 10, 1972, and not because he was involved on February 3. Thus, the money is not evidence of appellant's participation in that transaction.

The other connection between appellant and the February transaction was the presence of the brown Toronado in front the Days house. This, however, is not sufficient to show that appellant drove the car there or that he was at the house or that he was involved.

While the record shows that appellant used his old car a trade-in and gave some cash toward the purchase of the brown Toronado, that car was purchased in his brother's name, and, according to the uncontradicted testimony, was registered to

his brother. The Government produced no evidence to show that on February 3, 1972, the car was in appellant's possession or that he was using it. Thus, the presence of the car cannot, of itself, establish appellant's connection to the February 3 transaction.

The error was compounded here, for the Judge, in his charge to the jury, assumed appellant's presence on February 3, 1972, and instructed the jurors that if they found appellant participated in the February 10 transaction, the February 3 sale was evidence of appellant's knowledge of the nature of the later transaction.* The Judge removed from the jury's consideration the question whether appellant was involved in the earlier sale, so that fact was given to the jury as established.

Counsel was quite correct -- there was no connection between appellant and the act, and the Government's theory of admission was erroneous. The only possible theory to permit introduction of any testimony about the February 3 transaction was as rebuttal to the defense testimony that appellant had won the money in a dice game. Thus, it might have been permissible to introduce into evidence testimony that the money found on appellant's person was the money Bernhardt gave to Days on February 3, 1972. Even on this theory, no information about the transaction itself was proper, for appellant was not a party to it, and it thus could not be used to show his mental state.

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*Thus, the Judge negated the earlier charge given that the jury had to find that appellant was involved in the February 3 transaction in order to use that transaction as evidence against him.

Obviously, the failure of the Government to come up with a proper theory of admission, as well as its failure properly to limit its evidence, was highly prejudicial. Further, even under the limited theory articulated here, the admission of the heroin was improper (United States v. Talley, 489 F.2d 33 (2d Cir. 1973)), and was prejudicial, especially since no heroin was found in appellant's possession at the time of his arrest.*

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed, and the case remanded with a direction that the indictment be dismissed.

Respectfully submitted,

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*Small amounts of heroin and cocaine were found at appellant's arrest, but it was assumed that this was for his personal use and not for sale.

Certificate of Service

Nov 18, 1974

I certify that a copy of this notice of motion and affidavit has been mailed to the United States Attorney for the Southern District of New York.

Phyllis Kleck Bamberger